

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**HECTOR J. MADARIAGA**

Claimant

VS.

**EXCEL CORPORATION**

Respondent

Self Insured

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Docket No. 219,537

**ORDER**

Claimant requested Appeals Board review of the preliminary hearing Order Denying Medical Treatment entered by Administrative Law Judge Kenneth S. Johnson on March 11, 1997.

**ISSUES**

Claimant raised the following issues for Appeals Board review:

- (1) Whether claimant suffered an accidental injury that arose out of and in the course of his employment with respondent.
- (2) Whether claimant gave respondent timely notice of accident.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

Claimant seeks medical treatment for alleged injuries he received due to a series of accidents that occurred while working for the respondent from September 1994 through his last day worked of September 23, 1996. Claimant testified he suffered from pain in his shoulders, elbows, and low back as a result of the repetitive work activities of hanging

rounds of meat on hooks while working for the respondent. On the date of the preliminary hearing, March 5, 1997, claimant had not sought or otherwise received medical treatment for his alleged injuries. Claimant testified he knew he could go see the company nurse for his complaints but failed to do so. Claimant testified he notified respondent of his injuries through his supervisor, Brian Brown, on two separate occasions.

Claimant was terminated for excessive absenteeism on September 23, 1996, after being employed with the respondent for ten years. There is no evidence in the preliminary hearing record that the absenteeism was a result of his alleged work-related injuries.

At claimant's request, his supervisor, Brian Brown, testified before the Administrative Law Judge at the preliminary hearing. Mr. Brown established that claimant had notified him of his alleged injuries but he never got around to sending the claimant to the nurse for examination and treatment. Mr. Brown's only explanation for not sending claimant to the nurse was that he was too busy. At the time of the preliminary hearing, Mr. Brown also was no longer employed by the respondent. The respondent had terminated Mr. Brown for failing a urine analysis test in October 1996.

The respondent called Rick Peters, superintendent of first shift, fabrication department, to testify before the Administrative Law Judge. Mr. Peters was Mr. Brown's supervisor. He also knew claimant from working with him on both the night shift and the day shift over the ten years claimant was employed by the respondent. Mr. Peters established that the respondent had implemented a reporting procedure for work-related accidents which had been communicated to the supervisors over the last two years. When an employee reported an injury to a supervisor on Mr. Peters' shift, he was instructed to bring the employee to Mr. Peters who then made an assessment of whether the employee needed a change in job or needed to go to the nurse for examination and treatment. Mr. Peters testified Mr. Brown knew those procedures and Mr. Brown had not told him that claimant had reported a work-related injury. Mr. Peters further testified the company had an open-door policy where an employee was free to go to the nurse at any time. Mr. Peters indicated claimant never had taken the opportunity to see the nurse for his alleged injuries while he was employed by the respondent.

The Appeals Board finds that whether claimant was injured while working for the respondent hinges on the credibility of the witnesses. All three witnesses testified before the Administrative Law Judge. Therefore, the Administrative Law Judge had the opportunity to assess their demeanor and credibility. The claimant and his supervisor, Brian Brown, both had been terminated by the respondent for cause unrelated to claimant's alleged injuries. Claimant introduced no medical evidence to establish a causal relationship between his symptoms and his work. Claimant, in fact, had not sought medical treatment for his complaints. The Appeals Board finds some deference should be given to the Administrative Law Judge's conclusions in this case because he had the opportunity to assess the credibility of the witnesses. Therefore, the Appeals Board concludes the

Administrative Law Judge's finding that claimant failed to prove he suffered an accidental injury that arose out of and in the course of his employment, should be affirmed.

(2) The Administrative Law Judge in his preliminary hearing Order, denied claimant's request for medical treatment finding that claimant failed to prove he suffered an accidental injury that arose out of and in the course of his employment. In the preliminary hearing transcript, the Administrative Law Judge also found that claimant failed to give timely notice of accident. The claimant only raised the issue of whether claimant suffered an accidental injury in his Application for Review but raised the issue of timely notice in his brief. However, the Appeals Board finds it is not necessary to address the notice issue as it is rendered moot because of the above finding.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order Denying Medical Treatment entered by Administrative Law Judge Kenneth S. Johnson on March 11, 1997, should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1997.

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BOARD MEMBER

c: Henry A. Goertz, Dodge City, KS  
D. Shane Bangerter, Dodge City, KS  
Kenneth S. Johnson, Administrative Law Judge  
Philip S. Harness, Director